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Supreme Court, U.S.
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No. 98-1481

In the

Supreme Court of the United States

October Term, 1999

NORMAN P. KOSTER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF OF PETITIONER

THOMAS O. MEYER
MEYER & HORNING, P.C.
3400 N. Rockton Avenue
Rockford, IL 61103
(815) 636-9300

Attorney for Petitioner

5PP

QUESTION PRESENTED

Whether a defendant charged with the specific intent crimes of mail fraud and false statements is entitled to a separate jury instruction on his theory of defense, that he acted in good faith which was supported by the record evidence.

TABLE OF CONTENTS

Question Presented.....*i*
Argument.....1-3
Conclusion.....3

TABLE OF AUTHORITIES

Page

United States vs. Casperson,
733 F. 2d 216 (8th Cir. 1985).....3

United States vs. Gross,
961 F. 2d 1097 (3rd Cir. 1992).....1

United States vs. Hopkins,
744 F 2d 716 (10th Cir. 1984).....2

United States vs. Jobe,
101 F. 3d 1046 (5th Cir. 1996).....2

Willis vs. United States,
87 F. 3d 1004 (8th Cir. 1996).....2

ARGUMENT

The United States, (hereinafter Government), in its brief in opposition, states that the question of good faith instruction is only a minor disagreement among the Circuits. That argument and the Government's statement that the trend among the Circuits to not require a good faith instruction lacks merit. While it is clear this Court has denied Certiorari in several cases since 1985 on this issue, it is also clear the issue has not been resolved between the Circuits. Petitioner has pointed out most Circuits, in fact, have tacitly approved the giving of good faith instructions. (Petitioner's brief p.14-17). Nowhere is this more readily apparent than the decision of Unites States vs. Gross, 961 F. 2d 1097 (3rd Cir. 1992). The Gross Court stated:

> "While it was not reversible error for the District Court to refuse to give the good faith instruction in this case, we commend to the District Judges in the exercise of their discretion its use as a supplement to the "knowing and willful" charge in future cases.
> *Id. at 1103.*

In its brief, the Government has argued by way of example, that the Fifth Circuit has abandoned the requirement of a good faith instruction. (Government brief p. 9). This argument lacks any merit when considering a recent decision of the Fifth Circuit. As Petitioner pointed out in its brief, the Fifth Circuit in 1996 had held an instruction given on good faith was appropriate since the good faith of any defendant

may be considered when adjudicating his criminal intent. United States v. Jobe, 101 F. 3d 1046 (5th Cir. 1996).

Willis v. United States, 87 F. 3d 1004, 1008 (8th Cir. 1996) was also cited by the Government to support its argument. (Government brief p. 9-10). The Eighth Circuit did not state it was abandoning the requirement of a good faith instruction. Willis dealt with the issue of whether failure to proffer a good faith jury instruction was ineffective assistance of counsel.

The Tenth Circuit, the Government argues, may also reconsider its position. (Government brief p. 10). The Government though fails to cite any pending case to support this argument. More importantly, this argument is flawed when considering the position Tenth Circuit has consistently adhered since 1967 of requiring a separate good faith instruction. (Petitioner's brief p. 12-13).

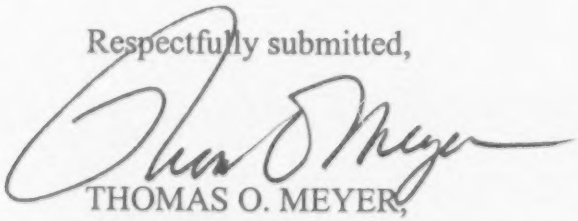
The Government further argues that no error occurred because, contained in the instruction given in the case, was the theory of good faith. (Government brief p. 6-8). This argument, though, ignores the dispute that exists between Circuits. The Tenth Circuit has considered this argument of a defendant's good faith being encompassed within intent instructions. The Tenth Circuit has held repeatedly, "instructions in willfulness, on aspects of intent, in untruths of representations or fraudulent statements are not sufficient to instruct a jury on the good faith belief of a defendant." United States v. Hopkins, 744 F 2d 716, 717 (10th Cir. 1984). The Eighth Circuit has held a jury must be instructed with

sufficient specificity to a defendant's good faith belief to avoid error. United States v. Casperson, 773 F 2d 216 (8th Cir. 1985). Clearly two Circuits have held repeatedly that supplemental instructions on good faith must be give in specific intent crimes. In the present case the District Court should have given the good faith instruction to supplement the instructions given. By instructing the jury on good faith, the jury would have been sufficiently instructed on the good faith defense of the Petitioner.

CONCLUSION

The question presented to this Court for resolution is whether failure to separately instruct on good faith is reversible error. A dispute between Circuits exists on this very issue requiring resolution by this Court. Without resolution by this Court, this issue will continue to be unresolved. For these reasons, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,



THOMAS O. MEYER,
Attorney for Petitioner
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Rockford, IL 61103
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